IN RELATION

TO

COLLISIONS AT SEA.

Chamber of Commerce of New-York,

December, 1858.

New-York:
JOHN W. AMERMAN, PRINTER,
No. 47 Cedar-street.

1859.

At a meeting of the Chamber of Commerce of New York, in May last, the following Report, Resolutions and form of a Law were adopted, and the Committee, to which the President of the Chamber was added, was instructed to memorialize the President of the United States and Congress, and also to present the same, with a circular letter, to the Boards of Trade and Chambers of Commerce in the Commercial Cities of this country and Europe; and to do such other things as might be calculated to further the objects of the Report.

At the regular meeting of the Chamber, in January, instant, a Supplemental Report was presented, which, by a unanimous vote, was adopted and ordered to be published and circulated, with the original Report, and which is thereto annexed.

The Committee was continued under its instructions of May last.

In conformity with the foregoing, the Chamber of Commerce of New York begs to lay the subject before you.

New York, January, 1859.

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New-York Chamber of Commerce, May 6th, 1858.

REPORT

OF

Committee on Maritime Collisions.

ORDER OF THE DAY FOR THURSDAY, MAY 13, 1858.

Collisions at Sea.—Mr. JOHN H. BROWER, Chairman of the Committee on Collisions at Sea, made the following report:

The Committee appointed to consider the subject of collisions at sea beg leave to report:

Experience has proved that collisions at sea are but a chapter in the dangers and casualties common to navigation. This must continue to be so while man is but human and imperfect. And in the progressive expanse of the world of commerce, the hazard of collisions may increase in common with the other hazards of the sea.

It has been and continues to be regarded in maritime law, that these collisions involve a class of pecuniary liabilities different from other sea risks. Different countries do not measure the liabilities arising from collisions by the same rule, while the consequences are adjudged in the courts of a nation according to its local laws, even in issues joined between its own citizens and those of another nation, whereby the latter may be mulcted according to rules and to an extent to which the laws of their own land are utterly at variance.

Formerly, at least in some places, it was a principle of maritime law, that in cases of collision the underwriter was bound not only to indemnify for the damage to the ship insured by him, but also for the damage to the other, provided

the fault of collision was chargeable to his insured—it being considered that the underwriter included in the risks he assumed those of the master and mariners as pertaining to this class of hazards. But recently, by a decision of the Supreme Court of the United States, the underwriter is not held to be liable beyond the damage to the vessel (whether at fault or not) insured under his immediate policy.

The rules which govern these cases generally, in the Admiralty Courts of the United States, are that the ship at fault is rendered, for herself and her owners, liable to the unoffending party to compensation for all damages direct and contingent.

When both parties are in fault, the loss is equally divided, each party paying one-half. Thus, if one ship be damaged $10,000, and the other $250,000, the first, with her owners, would be liable for damages to the amount of $130,000.

When fault is not imputable to either party, each must bear his own loss.

To these general rules a law of Congress, of 1851, makes an exception, limiting the liability of owners so that it shall not exceed the value of their respective interests in the ship and her freight then pending, if such owner or owners shall transfer his or their interest in such vessel or freight to a trustee, to be appointed by any court of competent jurisdiction for the benefit of claimants who may prove to be legally entitled thereto.

To avail of the benefit of this limitation it must be (we presume) confined to cases subject to adjudication in the courts of the United States, because a law of the United States cannot avail in another country, whose laws (local as our own) provide a different remedy. And to avail of the limitation at home, the transfer must be made voluntarily, and before judgment is obtained for a larger amount. In other words, a man must elect to give up his property, even in a doubtful case, rather than take the risk of being mulcted in damages to a larger amount than its value. Take, for instance, the case of a ship wholly at fault, or that she and the other be equally at fault—the other of manifold her own value: the lesser owner parts with his property rather than take the risk of much greater loss, while the owner of the larger retains his interest, with the chance of beating his adversary, and at the worst of only being brought in for the lesser loss at the end of a protracted litigation.

The law and the evidence by which fault may be made out, in whole or in part, in the collision of ships, are surround-

ed by the greatest possible difficulties. The principles have frequently left the nicest legal critics in doubt, and decisions have resulted acknowledged to be not entirely consistent with equal justice.

By a rule of the Roman law, to which the English and American courts aim to conform, we find that when collision occurs and no fault is imputable to either party, where the misfortune arose from circumstances neither could control, as from a greater force or power, from storm and waves, then each party must bear his own loss. This, however, is repugnant to the law of several maritime States. The Danish and Prussian codes divide the damages equally. The Swedish declares that the damage of both ships, their cargoes and freight, shall be equally divided. Holland apportions the damage between the two ships, if it was done reciprocally. The Russian law lets the loss fall where it lights. Thus conflicts exist between local laws, which a law common to all nations should reconcile, because international interests are affected according to the laws of that nation in which the action may be brought.

The manner of reasoning upon the general expediency of an equal division of damages is certainly remarkable. For instance, Valin is quoted as having said, "No better means of making the masters of small vessels, which are liable to be injured by the slightest shock, attentive to avoid collision, than to keep the fear of paying for half the damage constantly before their eyes. And if it be said that it would have been a shorter and more simple mode of adjustment to let each party bear the loss he had sustained, as arising from an accidental cause, the answer is that then the masters of large ships would have made light of collision with those of smaller burden. Upon the whole, therefore, no rule is so just as that of equal apportionment." Is it not a strange conclusion from such premises? Small ships must be carefully kept clear from larger, under pain of a (probably) much larger penalty than the amount of their direct damage. And if the larger had no recourse upon the smaller to make good a moiety of their (the larger) loss, they would make light of collision with those of smaller burden. Plain reason would seem to be exactly the opposite of this, inasmuch as the larger ship might be less careful to avoid collision with the smaller, in cases of an equal division of damages, with greater chances to receive from, than to pay to, the smaller as the result. This simple reasoning of Valin appears to us the strongest condemnation of the rule he deduces from it.

Under the rule of equal apportionment, although for the present underwriters are not held to be liable beyond the subject immediately insured by them, it is by no means certain (unless there should be made a general change, such as we seek, whereby to let the damage rest where it falls) that they may long continue to enjoy this exemption, or avoid duplicate liability, where those insured are wholly or equally at fault in collision with another subject of much larger value. Jurists, no less celebrated than Judge Story and Lord Denman, have found themselves, in their official judgments, directly at issue upon this very point. The earlier decision was in England, and pronounced by Lord Denman, that the underwriters were not bound to indemnify beyond the damage to the direct subject of their policy. Lord Denman says:

"But the collision causes the ship insured to do some damage to the other; and whenever this effect is produced, both vessels being at fault, a positive rule of the Court of Admiralty requires the damage sustained by both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out the ship insured has done more damage than she has received, and is obliged to pay the owners of the other ship some amount under the rule of the Court of Admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea. *It grows out of an arbitrary provision of the law of nations, from views of general expediency, not as dictated by natural justice nor (possibly) quite consistent with it*, and can no more be charged on the underwriters than a penalty incurred for contravention of the revenue laws of any particular State, which may have been rendered inevitable by the perils insured against."

The principle Lord Denman decided upon he quotes from Bacon, viz.:

"It were infinite for the law to consider the causes of causes and their impulsion one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that, or without looking to any further degree."

This principle we are content with if it be confined to the limit of the Russian law, viz.: "let the loss fall where it lights." But if Lord Bacon and Lord Denman go further to say that both collided ships must divide the amount of their combined damages equally, they may find themselves in the labyrinth of "causes of causes"—certainly involved in diffi-

culties, for Lord Denman is constrained to admit that the rule of equal apportionment grew out of an arbitrary expediency, not as dictated by natural justice, nor, possibly, quite consistent with it. With this language, and from such a source, there must be a radical defect in the precedents which control legal decisions under the rule in question. If this rule was changed so that each interest and its underwriter could not have more than a specific amount at stake, and that amount limited to the value of the specific interest or the sum named in the policy upon which the premium has been paid, each party could well understand his position and the extent of his liability—and, as appears to us, within the rules of both equity and justice. But if you go beyond this, there is scarcely a limit to liability, and no stronger reason for exemption to the underwriter than to the owner of the ship and freight. Indeed, as we have already said, Judge Story relieves the owner from this unlimited liability, and fixes it upon his underwriter—and in a case involving exactly the same principles as that upon which we have just quoted from Lord Denman. The case Lord Denman had under review was of the "De Vaux *vs.* Salvador, 4 Adol. & Ellis, 420; S. C. C. N. and M. 713." That upon which Judge Story pronounced judgment was "Peters *vs.* Warren Ins. Co., 3 Sumner, 389; S. C. 14 Peters, 99." This case went to the Supreme Court of the United States, from the District of Massachusetts, where it was governed and decided as follows:

"Where a collision between two ships accidentally took place within the dominion of a foreign power, by whose laws all damages occasioned thereby were to be borne equally by the two: Held, the collision was a peril of the sea within the meaning of a common policy of insurance; not only for the direct damage done to the ship insured by them, but also for the common loss, not as a general average, but properly as a part of the partial loss occasioned by the collision. The maxim, *the proximate not the remote cause should be considered*, is not of universal application in the law, and does not exclude incidental losses flowing as a legal or natural consequence from the direct injury or loss of the thing insured. The sentence of a foreign court of competent jurisdiction, acting *in rem*, is conclusive in respect to the matter on which it directly decides."

Judge Story, in pronouncing the opinion of the court, said:

"The question in all cases of this sort is what, in a just

sense, is the proximate cause of this loss? The argument in the present case, on the part of the defendant is, that the law of Hamburg is the immediate or proximate cause of the loss now claimed, and the collision but the remote cause. But surely this is an over refinement, and savors more of metaphysical than of legal reasoning. If the argument were to be followed out, it might be said with more exactness, that the decree of the court was the proximate cause, and the law of Hamburg the remote cause of the loss. In a just view of the matter, the collision was the sole cause of the loss, and the decree of the court did but ascertain and fix the amount chargeable upon the *Paragon*, and attached thereto at the very moment of the collision. The contribution was a consequence of the collision, and not a cause. It was an incident inseparably connected, in contemplation of law, with the sinking of the galliot, and a damage immediate, direct and positive from the collision."

After considering the maxim—"*The proximate not the remote cause should be considered*"—Judge Story noticed the case in which Lord Denman had decided adverse to his judgment, and said: "It was not supported by the analogies of the law or by the principles generally applied to policies of insurance."

Lord Denman, after reading the decision in the case of Peters *vs.* Warren Insurance Company, addressed the Hon. Charles Sumner as follows:

"Your report of Judge Story's sentiments on our decision in De Vaux *vs.* Salvador, had not escaped my memory, and his now recorded judgment makes me regret that we did not grant a rule to show cause, that a full decision of the point might have been had. If it should arise again, the case of Peters *vs.* Warren Insurance Company will at least neutralize the effect of our decision, and induce any of our courts to consider the question an open one."

We need not offer an excuse for quoting so largely from the recorded judgments of two such jurists as Lord Denman and Judge Story, since their arguments are upon a point of our subject of so much importance to it, and the more so as showing the fallacy of a law which leaves men of their legal learning at issue as to where the liability rests. Nor can we forbear to allude to the compliment paid by Lord Denman to the decision of Judge Story, when the former expressed his regrets that the question had not been more fully discussed at his own bench; and added, that after Judge Story's re-

corded judgment, should it arise again before any of the English courts, their former judgment would at least be neutralized and the question be considered an open one.

Although, therefore, there has been a later decision in the Supreme Court adverse to the rule as adjudged in the case of Peters *vs.* Warren Insurance Company, the English courts may find occasion to reverse the precedent established by Lord Denman, and the Supreme Court of the United States may have occasion to recur to and find its law as pronounced by Judge Story better than that of the later period. We do not consider the point by any means finally disposed of as to the liability of the underwriter for damage caused to another by the direct subject of his policy.

The laws applicable to the great highways of nations should be universal and simple. Nor should the large discretions necessarily intrusted to ship-masters in general cases be narrowed down to cumulative responsibility upon their owners in cases of collision. We do not, therefore, perceive the propriety of charging a vessel and owners with fault and pecuniary damages, where what is termed "fault" in the law should rather be called *accident*, *misfortune*, or, at most, *misjudgment*, any more than to cast upon the owners the pecuniary consequences of a disaster at sea occasioned by fire from the caboose, a stove or a lamp, or of wreck by the ship having outrun the master's reckoning, or of other casualties for which the ship and owners have only to bear their own direct loss, and not losses in common with others directly or remotely concerned; because, as to such other casualties, all parties interested take the risks of the same masters and mariners as in cases of collision. Let us take, for instance, the case of the collision between the Collins' steamer *Arctic* with the French propeller *Vesta*, which came in contact near Cape Race, in a dense fog; or the case of the French steamer *Lyonnais* in contact with the American bark *Adriatic*, which happened at night off Nantucket Shoals. If there was fault in these cases, was it more blameworthy than the total loss of the Cunard steamer *Columbia*, at Seal Island, near Cape Sable; or of the Havre line steamer *Franklin*, on the coast of Long Island; or of the steamer *Humboldt*, of the same line, which run upon a rock off Halifax? These last two steamers, we believe, were lost in a fog, and in the same kind of weather might as easily have been lost by collision as by stranding, and without any greater fault or lack of discretion on the part of the masters and mariners. Yet in the cases of these steamers the law is clear and simple, and no

one pretended their owners to be involved in any pecuniary liability beyond such part of their direct ownership as may not have been insured. On the other hand, in the case of the *Vesta* and *Arctic*, going in contrary directions, they came nearly "head on" to each other, incurring, by the rules in such cases, as we suppose, mutual fault, and perhaps an equal division of the combined damages; and, if so, the owners of the *Vesta* may still be liable to a suit, which may result in damages to the other party to at least $750,000.

The statement recently made to Congress by Captain Durham touching the collision of the *Adriatic* with the *Lyonnais* has such strong and clearly-marked points about it, both in reference to his close watchfulness of duty and propriety of conduct on that occasion, and the apparent disregard, on the part of the appellant court in France, for any thing but indemnity to the owners of the *Lyonnais*, that we cannot but recur to its prominent incidents. Captain Durham says, that at half-past 10 at night, the watch on the look-out made a light about three points on the weather bow, when he caused a light to be hoisted in a proper position to be seen by the vessel which was steadily approaching his, and that it was visible to himself and his crew on deck that the steamer would go clear if she continued her then course; but when within a third of a mile, her course was suddenly changed, bearing down upon the *Adriatic*. Fearing that a collision would occur, Captain Durham put his helm down, his bark came into the wind so that her sails were all shaking, and her headway was nearly stopped; and if he had not put his helm down the steamer would have struck his vessel amid-ships, and buried her and her crew in the ocean. The steamer struck the bark forward, leaving her (the bark) "a perfect wreck;" the steamer pursuing her course, without stopping, until she was lost in the distance. Thus there was a perfect look-out on the part of the *Adriatic*, Captain Durham, himself on deck, a signal light displayed, the *Lyonnais* plainly in view, her course distinct, and its range free from that of the bark; and the collision was wholly the consequence of the course of the *Lyonnais* being suddenly changed when near the bark—instead of which, had the steamer pursued her course it would in all probability have been avoided. The *Adriatic*, it would seem, was unexceptionable in all her movements, and being acted upon defensively when contact became unavoidable. In a port in France, "La Ciotat," after discharge of cargo, and having cleared for Sicily, the *Adriatic* was seized, her freight money withheld, and upon a summary

plea, "it was decided by Article 14, Code Napoleon, that the courts of France had jurisdiction in cases of this kind." The case was tried by the Tribunal of Commerce, and decided in favor of the *Adriatic*, acquitting her of all blame, and awarding her 500 francs per day during her detention by the prosecutors. Five days afterward the case was taken to the Court of Aix, where it was argued. The judges being unable to give a decision, it was referred to three shipmasters, who went on board the *Adriatic*, examined her signal light used at the time of the collision, reported it sufficient, and in a proper position ten minutes before the accident; and that the steamer violated a well-known regulation by putting her wheel starboard, endeavoring to pass the bark to the left instead of the right. After this report the case was again brought before the Imperial Court of Aix, and notwithstanding the report of experts chosen by themselves, the court decided against the *Adriatic*, on the ground that if the light had really been set, it was either too small or placed in a bad position to be seen by the *Lyonnais*, or, finally, set too late. And judgment was given against the bark and freight amounting to confiscation, and against Captain Dunham for 2,000 francs of his private funds; and he escaped, fearing imprisonment for non-payment of 1,500,000 francs, the value of the *Lyonnais*. Here, then, contrary to the evidence of a commission of investigation appointed by the Imperial Court itself, contrary to the decision of the Tribunal of Commerce, and contrary to a well-known maritime usage, the Imperial Court at Aix adjudges condemnation of the property of citizens of another and friendly nation holding mutual treaty relations, and virtually lays an embargo upon the trade of these citizens with France under pain of seizure of their property, should it be found in her ports, until the judgment of her courts shall have been satisfied in full. The remarks of the Paris correspondent of *The Commercial Advertiser* in this relation are very pertinent. He says:

"The arrival of the American ship *Adriatic* at Savannah is noticed by the French journals, but without comment. Their abstinence in this case is a mark of their good judgment, since even for courts and cabinets the question involved is one of the most delicate nature on account of the difficulty of harmonizing the maritime laws of different nations. If the question should become one of diplomacy, if Gauthier Freres persist in the right of sequestration of the ship, the question will then come up, 'Has a nation the right to interpret her own law on her own soil or not, even when the

individual criminated is a foreigner?' A question which can only be answered in the affirmative. In that case the *Adriatic* must be sold, even in the ports of the United States, to pay the debt due to the owners of the *Lyonnais*. But it is thought that the brothers Gauthier having fallen into difficulty of a more serious charaeter, a prosecution will not be pushed against the owners of the ship. In any case, Captain Durham eannot be demanded by the French government, and, so far as he is concerned, is free so long as he does not return to France. The question of debt, however, is another affair."

Captain Durham, driven to extremities, has certainly placed himself in a position of the greatest possible difficulty should circumstances again find him in France. But not to dwell upon that, it must be plain that repetitions of such adjudications and of their consequences, must disturb the commerce of friendly powers, and eventually may lead to open hostilities between them. It is scarcely more tolerable than impressment upon the high seas.

There is, perhaps, no class of legal cases in which the evidenee is of such diffieult solution; the faets seldom harmonizing, generally conflieting, and frequently in direct contradiction. This may frequently be so from the nature of the case—all being confusion, fright, and the absence of reflective observation at a moment when the main object may be personal preservation—"every man for himself." It may be supposed that in peculiar conditions of the atmosphere, even in the day time, the distance between objeets is deceptive; they may be dimly in view and supposed to be far off; the deception is scarcely removed until the moment of eontact, in the suddenness of which consternation and multiplied calamity are the consequence. While danger dissipates the hope of escape, the mind is apt to lose its power to take in, digest and deliberate the details, truthfully, of the scene. The power of reflection becomes weakened or destroyed at such a crisis. As an illustration of this, we may recur to the loss of the steamer *Home*, some years since, upon our coast, where, while she was laboring in the storm, it was fancied by some on board that she had so nearly broken in two as to be "opening and shutting like a hinge." This impression so much prevailed, that in the defence of the underwriters, upon the plea of unseaworthiness, the testimony taken under commission abounded in this same almost stereotyped expression. We do not mean to say the witnesses testified fraudulently, but they certainly gave their evidence under a mistake of

the fact—they proved too much, and it needed but a single suggestion from the opposing counsel to the court and jury to remind them that a ship at sea broken open as represented, would not close again, but would fill and founder instantaneously.

In any case of unintentional collision it will be found, and most naturally, that each party will present the strongest testimony in his own justification; even when the rules, ordinarily applicable to such cases, may have been departed from, strong, if not sufficient, reasons are adduced for it. In many cases of departure from the rules, although the collision may not have been avoided, had the rules been strictly observed the consequences might have resulted more fatally. And it is not at all improbable that collision cases are frequently improperly decided by a skilful management of witnesses, or by a theory (rather than the precise facts) of the case formed after the danger was past, and the minds of men had become calm and reflective.

Notwithstanding the rules established by law and custom to avoid collisions at sea, and the disposition and efforts to observe them, these disasters are not of unfrequent occurrence. The causes are manifold, and clearly a "danger of the seas." They are a consequence of navigation as much as "fire," and as certain, if not as frequent, as disasters by the winds and waves. Nor should this class of hazards fall on ship-owners as *carriers*, any more than the consequences of fire, or any other disasters equally incident to navigation.

We do not accord to the principle that the carrier of cargoes upon the ocean, for hire, has any more than a common interest with the shipper and underwriter. The carrier provides his ship and equips her for the voyage. In doing so he is thrown upon the market for mariners, of whose character and capacity he cannot know more than the shipper of cargo or the underwriter upon it—nor can he have any better security than they for the fidelity of the master, or the wakefulness at night of the watch upon deck. Nor is it contemplated in the rate of freight that the carrier receives any special remuneration for the risk of collision; the fact is, rather, that he merely gets pay for a specified quantity of room in which to carry cargo for the voyage. The shipper of cargo well understands this, and that his risk of collision is covered under the common form of marine insurance policy, equally with the other risks to which the voyage is subject. The underwriter insures with the knowledge that he is subject to and liable for this risk, so far as it may be the cause of damage

to the property insured by him. Here, then, are the ship carrying the cargo, for a stipulated hire, the shipper furnishing the cargo, with the knowledge that his recourse is to his underwriter (if insured) in case his property suffers by collision, and the insurer assuming the risk for an acknowledged consideration. In this position of things, two vessels come in contact and are damaged, one perhaps to the extent of $20,000, the other to the extent of $200,000; upon each insurance has been paid, (or else the parties in interest are their own underwriters, believing the risk not worth the premium,) and the question is, "Why should the larger loser have recourse to the smaller to make the damage equal, even supposing both to be equally at fault?" If the accident amounted to a total loss, as in the case of the *Adriatic* and *Lyonnais*, the underwriter could not suffer to a greater extent than he had received a premium for, and we cannot conceive of the propriety of his being entitled to fall back upon parties who had received no compensation to become his guaranties against the hazard which he had himself assumed. The plain truth is, the underwriter took the larger risk for a larger amount of consideration, and therefore should be content with the direct consequences. We are therefore clear in our convictions, that such disasters should, each vessel by itself, be settled and terminated without recourse to the other. To do this, the underwriter would only vacate the mere chance (generally of not much value) of saving something at the end of vexatious and expensive litigations with third parties, known or unknown, of whatever nation they might be. We are clearly of opinion that underwriters would not really suffer by the change, for should it be found to enhance their risks, this could be regulated in the rates of premium, which are always matter of contract.

We have not alluded in the discussion of this report to the position of the underwriter, or any other party interested in this class of cases, separately, but to each—incidentally or correlatively—as they have naturally presented themselves in the argument of a principle which we think needs to be thoroughly redeemed from radical error.

It is not necessary to go further in the premises in hand than to embrace those cases of collision which result from accident, misfortune, or, it may be, a misdirected judgment. To these our discussion has thus far been confined. There are comparatively but few men in the world who would so far disregard the value of their own and the lives of those committed to their protection upon the deep, as to be guilty

of a wilful collision with a neighboring ship—the chances being equal of their own destruction. When such cases do occur, the laws of nations should make them piracy, and punish the perpetrators as pirates.

Our laws should also, if they do not already, provide ample penalties to be inflicted upon persons guilty of steamboat racing in the rivers, bays and lakes of our country, because of the danger to life and property incident to such cases.

Whatever be the law—upon this and other equally important maritime questions, it should be universal and be made a subject of treaty stipulations between the commercial nations of the world. Science has shortened distance, if we measure it by time, and made close neighbors of correspondents at the extremes of the earth, and thereby strengthened the cords of mutual confidence and frendship which bind the commercial world together.

It should be our aim and our effort to modernize and harmonize principles which are inconsistent with equity and justice, or which continue in conflict by local laws, and which, on the contrary, should be adjudicated as purely international questions.

With these views we beg to submit the annexed form of a law to be laid before Congress, if this Chamber approve of it, and also to offer the following resolutions, viz.:

Resolved, That a copy of the foregoing report and of the annexed form of a law, with the authentication of the Chamber of Commerce of New-York, be forwarded to the Congress of the United States, with our petition for its enactment.

Resolved, That a copy of this report and of the annexed form of a law, authenticated as aforesaid, be presented to the President of the United States, with our respectful petition that the President will, if agreeable to his sense of the propriety of our object, open negotiations with the representatives of other governments resident in Washington, with a view to corresponding enactments in the countries represented by them respectively, and, as opportunities may offer, of having the principles of the proposed law included in our treaties with other nations generally.

Resolved, That authenticated copies of these papers be transmitted to the Chambers of Commerce and Boards of Trade of the principal commercial cities of the United States and in

Europe, requesting their co-operation in furtherance of the object in view.

Respectfully submitted.

J. H. BROWER, T. TILESTON,
A. A. LOW, THEODORE DEHON,
CHAS. H. MARSHALL, M. H. GRINNELL.

New-York, May 5, 1858.

AN ACT TO LIMIT PECUNIARY LIABILITIES OF SHIPS AND THEIR OWNERS; AND TO PUNISH, CRIMINALLY, FOR WILFUL AND WANTON ACTS IN MARITIME CASES.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

SECTION 1. In all cases of collisions between ships or vessels upon the high seas, or upon the lakes, bays and rivers of the United States, the owner or owners of either or any of such ships or vessels shall not be liable, in pecuniary damages, to the owner or owners of any other of such ships or vessels, nor to the underwriters thereupon, nor to any other person or persons interested therein. Nor shall the owner or owners of any ship or vessel, which may be lost or damaged by collision as aforesaid, be liable to any shippers, owners, consignees or underwriters, for any loss or damage which may occur to cargo laden on board such collided ship or vessel, or on board of either of them.

SEC. 2. In all cases of collision as aforesaid, each owner and part owner of any ship or vessel, and of her freight, and each shipper, owner or consignee of cargo, or the underwriters for any and all of them, (so far as they may be insured,) shall be at his and their own risk for whatever interest he or they may have pending at the time and place of such collision, in the same manner as in cases of other damages occasioned by the "dangers of the seas," and to be settled according to the customary rules of average and salvage, each collided vessel, freight and cargo adjusting its losses and damages separately, and without reference to or liability of the other.

SEC. 3. All cases of collision upon the high seas, or upon the lakes, bays and rivers of the United States, which shall happen by the wilful, malicious or premeditated act of the mas-

ter, mariners or other person or persons on board the ship or vessel thus brought in contact with another by the wilful, malicious or premeditated act as aforesaid, shall be piracy, and the persons as aforesaid guilty of the act shall be punished as pirates.

SEC. 4. On and after the passage of this act, neither vessels nor their owners shall, upon contracts of affreightment, or other maritime contracts, be subject to any common law liability to shippers, consignees, underwriters, or other persons, for any maritime disasters, or the consequences thereof, although such disasters, and the consequences thereof, may be traceable, directly or remotely, to the mistakes or delicts of the masters and mariners, unless the said vessel-owners, or their authorized agents for them, shall have contracted for a premium of insurance, to become insurers against the disasters aforesaid and their consequences.

SEC. 5. All laws now in force, whether by statute or by usage, precedent or custom, which are inconsistent with this act, are hereby repealed.

SUPPLEMENTARY REPORT.

The *Boston Daily Courier*, of May 12, 1858, contains a criticism upon the foregoing Report, which deserves attention. While we shall endeavor to discuss the merits of the criticism fairly, and necessarily at some length, it will not be from any desire for controversy, but rather that the review of the subject may embrace what comes within its range, at least so far as we have had access to the appropriate matter for our purpose, in order to a practical understanding of it, by those whose office it may be to provide needful modifications of existing laws.

The criticism begins as follows: "The report of a Committee of the Board of Commerce of New-York on this subject," (collisions at sea,) "seems to be one of the most extraordinary documents of the times. The object of the report is to introduce and recommend a new law, to be established by all commercial nations, to the effect that in cases of collision, no person, owner, master or mariner shall be liable for any damage caused by collision, however carelessly or negligently occasioned, unless it was wilful and premeditated, in which case the offending party is to be deemed a pirate. As it is not likely that all civilized nations will abandon the established rule of law, by which persons are held liable for damages resulting from their own fault, negligence or carelessness, or that of their servants and agents, a rule hitherto supposed to rest upon well settled principles of public policy, upon this suggestion, I do not propose to consider the nature, effect or policy of the proposed new law, but only to ask the attention of your readers to some curious mistakes into which this committee have fallen in their report."

The report says: "It is not necessary to go further in the premises, than to embrace those cases of collision which result from *accident*, *misfortune*, or, it may be, a *misdirected judgment*. To these our discussion has thus far been confined. There are, comparatively, but few men in the world who would so far disregard the value of their own and the lives of those committed to their protection upon the deep,

"as to be guilty of a wilful collision with a neighboring ship, "the chances being equal of their own destruction. When "such cases do occur, the laws of nations should make them "piracy, and punish the perpetrators as pirates." These terms, "accident," "misfortune" and "misdirected judgment," cannot fairly be changed to "however *carelessly* or *negligently* occasioned." It is not the language or spirit of the report, to invite or justify *carelessness* or *neglect.* On the contrary, its language is, "Notwithstanding the rules estab- "lished by law and custom, to avoid collisions at sea, and the "disposition and efforts to observe them, these disasters are "not of unfrequent occurrence. The causes are manifold, "and clearly a *danger of the seas.* They are a consequence "of navigation, as much as *fire*, and as certain, if not as fre- "quent, as disasters by the winds and waves." The report alludes to the fact as it is, in the nature of things, and as no more the result of *carelessness* or *neglect* than are other casualties incident to navigation. The skill of the same master and mariners is as reliable against this class of accidents, as against any and every other. There seems to us good reason, therefore, for modification of the law in this particular.

When collisions result from *wilful*, *malicious* or *premeditated* acts on the part of the masters, mariners, &c., it is proposed to treat such persons as pirates, because of a just appreciation of the integrity and faithfulness requisite in shipmen in traversing the ocean, and of the necessity of criminal penalties in cases in which pecuniary damages would be inadequate. Besides, such offences deserve the name of piracy and its penalty, equally, at least, with *robbery upon the high seas*, and some others which are made piracy by statute.

The first article of the criticism we need not further allude to here, as its topics may come in, incidentally, as we proceed.

The criticism next in order quotes from the report, as follows: "To these general rules," (as to liability for damages in cases of collision,) "a law of Congress of 1851 makes an ex- "ception, limiting the liability of owners, so that it shall not "exceed the value of their respective interests in the ship "and her freight, then pending, if such owner or owners shall "transfer his or their interest in such vessel and freight to a "trustee, to be appointed by any court of competent juris- "diction, for the benefit of claimants who may prove to be "legally entitled thereto. To avail of the benefit of this "limitation, it must be (we presume) confined to cases sub- "ject to adjudication in the courts of the United States, be-

"cause a law of the United States cannot avail in another "country, whose laws (local as our own) provide a different "remedy. And to avail of the limitation at home, the trans- "fer must be made voluntarily, and before judgment is ob- "tained for a larger amount. In other words, a man must "elect to give up his property, even in a doubtful case, "rather than take the risk of being mulcted in damages to a "larger amount than its value. Take, for instance, the case "of a ship wholly at fault, or that she and the other may be "at fault, the other of manifold her own value, the lesser "owner parts with his property rather than take the risk of "much greater loss, while the owner of the larger retains his "interest, with the chance of beating his adversary, and, at "the worst, of only being brought in for the lesser loss at the "end of a protracted litigation." After this quotation from the report, the criticism proceeds: "If any member of the "committee had read the act of Congress referred to, such "a statement of it could not have been made. The third sec- "tion of this act expressly provides, that *the liability of the "ship-owner shall in no case exceed the amount of his inter- "est in the ship and pending freight.* There is no provision, "express or implied, that this limitation is to depend upon a "transfer or abandonment of his interest. The next section "provides that, in cases *where the damage done exceeds the "value of the vessel and freight*, the owner may abandon, "and shall be then discharged from all personal liability. "This right to abandon exists only (as it would seem) when "the damage done exceeds the value of vessel and freight, "and when exercised, terminates all personal liability. The "assertion, that the limitation of liability depends upon the "fact of an abandonment, is an entire misstatement of the "law, and of course forms no ground for the argument based "upon it. Another assertion is, that the benefit of this limi- "tation would be confined to cases adjudicated in the United "States. The writer is evidently ignorant, that what this "act has made law in this country, is, and has been for cen- "turies, the prevailing law of the maritime world; and that "in all civilized commercial nations, except Great Britain, "the liability of the owner is limited to the value of the "vessel and freight, and may be discharged by an abandon- "ment. In England the liability is also limited, but there is "no law authorizing an abandonment."

Both, the report and criticism, agree that the law of Congress limits the liability of ship-owners, but they are at issue as to the practical operations of that law. The report as-

sumes, that the only way in which the ship-owner can avail of the benefit of the limitation, is by surrender or abandonment, and that before judgment is perfected against him. The criticism contends, that the third section of the act limits the liability in all cases; and the fourth section, while it provides the right to abandon, is supposed to confine that right to cases in which the damage done exceeds the value of vessel and freight.

The report presumes, also, that the limitation under the act cannot avail in other countries, whose local laws provide a different remedy. To this it is objected, in the assertion that what the act of Congress has made law in this country, is, and for centuries has been, the prevailing law of the maritime world.

The third and fourth sections of the act of Congress are so much referred to in this discussion, that it is proper to here insert them. They are as follows:

"SEC. 3. The liability of the owner or owners of any ship "or vessel for any embezzlement, loss or destruction by the "master, officers, mariners, passengers, or any other person "or persons, of any property, goods or merchandise, shipped or put on board of such ship or vessel; or for any loss, "damage or injury by collision; or for any act, matter or "or thing, damage or forfeiture, done, occasioned or incurred "without the privity or knowledge of such owner or owners, "shall in no case exceed the amount or value of the interest "of such owner or owners, respectively, in such ship or "vessel, and her freight, then pending.

"SEC. 4. If any such embezzlement, loss or destruction "shall be suffered by several freighters or owners of goods, "wares or merchandise, or any property whatever on the "same voyage, and the whole value of the ship or vessel and "her freight for the voyage, shall not be sufficient to make "compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel in "proportion to their respective losses; and for that purpose, "the said freighters and owners of the property, and the "owner or owners of the ship or vessel, or any of them, may "take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or "owners of any ship or vessel may be liable, amongst the "parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the "part of such owner or owners, if he or they shall transfer "his or their interest in such vessel and freight, for the benefit

"of such claimants, to a trustee, to be appointed by any "court of competent jurisdiction, to act as such trustee for "the person or persons who may prove to be legally en- "titled thereto, from and after which transfer all claims and 'proceedings against the owner or owners shall cease."

It is not contended that the third section does not clearly set forth the measure or extent of liability; but the owner has something to do to avail himself of the limitation. The fourth section provides for that something, and, to make the third effective, must be taken with it. We are told that the third section makes no provision, express or implied, that the limitation is to depend upon a transfer or abandonment. Be it so. But certainly there is an *implied* necessity, and the fourth section recognises the necessity, and makes the express provision for both, the transfer and apportionment; as if the third section was a bond, and the fourth the conditions of it.

We do not perceive (for the purposes of the law under discussion) that there can be any force in the opinion, that the right to abandon exists only when the damage done exceeds the value of the ship and freight, because there can be no utility in the right while the property liable is clearly of greater value than the amount of damage done. But when the amount of damage is large, and may exceed the value of ship and freight, there is a utility in the limitation law, if the owners of the ship elect to avail themselves of it, (rather than take the chances of larger liabilities being proved against them) which we have no doubt the act would enable them to do in the courts of this country.

We think this principle is fully sustained by Judge Kane, in the case of Watson *vs.* Marks, (Steamship Union) Am. Law Register, vol. 2, p. 166. He says: "The policy of our "own law is happily explained by Emerigon in his remarks "on the corresponding law of France," from which he quotes as follows: "The owner's liability for the captain's "acts is rather a liability *in rem* than *in personam*. While "the voyage is in progress, the captain may take up moneys "on bottomry, or pledge the apparel of the ship, or even sell "his cargo. But this is all. His legal authority does not "go beyond the limits of the ship under his command, the "ship confided to his administration. He cannot involve the "general estate of his owners, unless they have specially "authorized him to do so. In the absence of special au- "thority, *there is no personal recourse against the owners,* "*unless they elect to retain their interest in the ship; if*

"*the ship perishes, or they release their interest in it, they* "*cease to be answerable.*"

It would seem as if this reasoning was upon the minds of those who framed the act of Congress, at the moment of their writing the fourth section, (in which to give effect to the third,) viz.: *And it shall be deemed a sufficient compliance by the owners, if they transfer their interest to a trustee for the person or persons who may prove* (not who shall have proved) *to be legally entitled thereto, from and after which transfer all claims and proceedings against the owners shall cease.*

Now, suppose a damage has been done, the amount doubtful and the liability of the ship charged with it, questionable. The ship is arrested for it. The owners must either transfer the ship, (as by the fourth section of the act,) because there is not in the statute, even by the remotest inference, any provision whereby she may be appraised and bonded, or they must give security for the whole amount claimed, in order to release the ship, and thereby turn the action, virtually, from the ship, *in rem*, to themselves, *in personam. The owners thereby elect to retain their interest in the ship, and consequently the recourse is against them.* This is precisely the argument of the report, and we believe it is not "a misstatement of the law," because its language implies that owners may transfer while proceedings are pending, but not after they have terminated.

Is the report correct in the supposition that, "to avail of "the benefit of this limitation, it must be confined to cases "subject to adjudication in the courts of the United States?" If it is not, what becomes of the verdict in France against the owners of the American bark Adriatic, for the value of the French steamer Lyonnais, say 1,500,000 francs? Perhaps the answer may be, "the *Adriatic* was not surrendered." But the owners of the "Lyonnais" had her under seizure, and we understand their proceedings were *in rem.* If, therefore, the laws of France and the United States are in conformity, and are to be construed internationally, why did not the principle of the third section of the act of Congress prevail, and limit the verdict to the forfeiture of the "Adriatic" and her freight?

But not to rely upon a single case, and to remove every thing which may seem to leave a doubt in reference to the rule of adjudication in the case of the "Adriatic," there seems to be no benefit of the limitation law of England, ex-

tended to the ships of other nations, or to their owners, as may be seen by the following:

The "Tuscarora" and "Andrew Foster," two American ships, came in collision in the Irish Channel, April 27, 1857. The "Tuscarora" was bound from Liverpool for Philadelphia, and was so much damaged as to be obliged to return to Liverpool for repairs. The "Andrew Foster" was bound from New-York for Liverpool, and the ship and cargo totally lost by the collision. The "Tuscarora" was adjudged to be in fault. About 8th May, 1857, the "Tuscarora" was arrested, with her freight, by Admiralty warrant, in an action for £8,000 sterling, on behalf of parties at Liverpool, who were consignees of portions of the Andrew Foster's cargo. It was then necessary to give bail or to lay the ship up in the docks until the suit should be terminated; and as it was believed that the liability of the owners could not extend beyond the value of the ship, freight and passage-money, bail was given, and the ship released. In October, 1857, the Tuscarora, having returned to Liverpool, was again arrested by Admiralty warrant in an action for £1,800 sterling, entered by a party in Liverpool, for another portion of the Andrew Foster's cargo, and bail was again given on the same view as to the limit of the owner's liability. In November, 1857, the case came on for hearing in the Court of Admiralty, when the Tuscarora was condemned in the damages and costs. From this her owners appealed to the Judicial Committee of the Privy Council. On the 30th January, 1858, the owners of the Andrew Foster and some parties resident in the United States, American citizens, owners of other portions of the cargo of that vessel, entered an action in the Court of Admiralty for £23,000 sterling, and the Tuscarora was again arrested for that sum. The aggregate amount of the first and second actions, £9,800, being in excess of the value of the Tuscarora, at the time of the collision, a motion was made in the Court of Admiralty, by her owners' counsel, that the ship might be discharged from the arrest in the third action for £23,000. This motion proceeded on the ground, that the process of the court being *in rem*, and bail having already been given for her value, the ship must be considered to have been exhausted by the proceedings in the first and second actions, as much as if, instead of bail being given, she had been allowed to remain under arrest. The court, however, refused to discharge the arrest unless bail were given, and, consequently, the ship, from that time, remained in the custody of the officer of the court

on the third warrant. On the 25th March, 1858, the decision of the Court of Admiralty, as to the liability of the Tuscarora for the damages, was confirmed by the Court of Appeals. Proceedings were then taken in the Court of Chancery, in accordance with the "Merchants' Shipping Act of 1854," to obtain a decree for limiting the liability of the owners to the value of the ship, freight and passage-money, and for the distribution of the amount amongst the parties who might come forward and prove their claims. In the first instance the case came before Vice-Chancellor Wood, who refused to grant the relief prayed for, *on the ground that the statute did not apply to foreign vessels*, but he intimated that, so far as regarded the American claimants, a case might possibly be sustained for putting them in the same position as they would have occupied by the American law, to which his attention was called. This intimation from Vice-Chancellor Wood was not acted upon by the counsel for the owners of the Tuscarora, because they were not certain such a decree would eventually be pronounced, and if obtained, it would only be after protracted and costly litigation, and that they did not think the benefit to be derived from it, if obtained, would be equivalent to the outlay required to prosecute it. It would seem that the Vice-Chancellor had mainly pre-judged his own suggestion, in his disposal of the petition to limit the owners' liability, having denied it, "on the ground that the statute did not apply to foreign vessels." The Vice-Chancellor's judgment was confirmed, on appeal, by the Lords' Justices. Consequently the parties to the first and second actions will be paid in full, and the proceeds of the Tuscarora, to be sold by the decree of the Court of Admiralty in the third action, will be divided, it is presumed, between the parties to that action and to another action for £800, which has since been entered.

The result of this case is to show that, practically, there is no limitation, in England, of the liability of the owner of a foreign ship for damage happening by collision or otherwise, and such owner, if found there, would be made answerable to the extent of his whole fortune, where a British ship-owner, under similar circumstances, would lose only his ship and freight.

Our correspondent in England, who has kindly favored us with the particulars of this case, says: "In any case which "may hereafter occur, where a foreign vessel, by collision, "destroys property of greater value than herself, she cannot be "bailed, unless, indeed, all the claimants come forward sim-

"ultaneously, but must be laid up useless, until the litigation "is finally settled. This, under favorable circumstances, must "occupy some months. In every heavy case the time would "be protracted by appeal; and occasionally, from the ab- "sence of witnesses, a disposition (which sometimes exists on "the part of one of the litigants or his agents) to impede "the progress of the cause, or other circumstances, the de- "tention might be prolonged for an indefinite period. Should "all the claimants come forward simultaneously the vessel "might be appraised, and would be released on bail being "given for her value; *but still the owners would be liable "personally for the balance of loss not covered by their ship.* "It is obvious that measures should at once be taken to ex- "tend to American ship-owners in this country, and, if neces- "sary, to British ship-owners in the United States, the same "protection which is now accorded to them respectively by "the laws of their own country, and as the policy of "limited liability is conceded by the statute laws of both "countries, it is difficult to see on what grounds interna- "tional arrangements, to carry out that policy in each coun- "try, as regards the subjects of the other, could be opposed."

In view of these cases, what becomes of the assertion, viz., "The writer is evidently ignorant that what this act of Con- "gress has made law in this country, is, and has been for cen- "turies, the prevailing law of the maritime world," &c. Is there any practical international utility in such local laws; and is not the effect of adjudications abroad exactly what the report supposes it to be?

We next take from the criticism as follows: "The report "then proceeds to argue, that because owners of ships are "not responsible in other cases, where loss is occasioned by "the fault or carelessness of their agents, they should not "feign causes of collision, as follows:" (From the report.) "The laws applicable to the great highways of nations "should be universal and simple. Nor should the large dis- "cretions necessarily intrusted to ship-masters, in general "cases, be narrowed down to cumulative responsibility upon "their owners in cases of collision. We do not, therefore, "perceive the propriety of charging a vessel and owners with "fault and pecuniary damages, where what is termed *fault* "in the law should rather be called *accident*, *misfortune*, or, "at worst, *misjudgment*, any more than to cast upon the "owners the pecuniary consequences of a disaster at sea, "occasioned by fire from the caboose, a stove, or a lamp, or "of wreck by the ship having outrun the master's reckoning,

"or from other causes, of common casualty, for which the "ship and owners have only to bear their own direct loss, "and not losses in common with others directly or remotely "concerned; because, as to such other casualties, all parties "interested take the risks of the same masters and mariners "as in cases of collision. Let us take, for instance, the case "between the Collins steamer Arctic and the French pro- "peller Vesta, which came in contact near Cape Race, in a "dense fog; or the case of the French steamer Lyonnais in "contact with the American bark Adriatic, which happened "at night off Nantucket Shoals. If there was fault in these "cases, was it more blameworthy than the total loss of the "Cunard steamer Columbia, at Seal Island, near Cape Sable; "or of the Havre line steamer Franklin, on the coast of "Long Island; or of the steamer Humboldt, of the same "line, which run upon a rock off Halifax? These last two "steamers, we believe, were lost in a fog, and in the same "kind of weather might as easily have been lost by collision "as by stranding, and without any greater fault or lack of "discretion on the part of the masters and mariners. Yet in "the cases of these steamers the law is clear and simple, and "no one pretended their owners to be involved in any pecu- "niary liability beyond such part of their direct ownership "as may not have been insured." The criticism adds, "The "report states truly, that in such cases the law is clear and "simple, but unfortunately states it to be precisely opposite "to what it is." Let us see.

The article of the report last quoted by the critic contends, in effect, that the large discretion necessarily intrusted to ship-masters, in general cases, should be equally large (without involving owners in liability) in the risks and consequences of collision. That the propriety of charging *fault* and pecuniary damages, where fault should rather be called accident, &c., is not perceived, any more than the charge of fault would be applicable to such other common casualties, as for which the ship and owners are not bound, (be those casualties what they may, if they do not bind the ship, &c.) The reasoning of this part of the report is upon equitable and moral grounds, in view of which the ship and owners should be no more liable for the mistakes or misfortunes which result in collision, than for those of same agents or servants, which result in fires, &c. In other words, if there was a good reason to supersede the common law by statute, in other cases there are as strong and just grounds for modifications in regard to collisions. To illustrate this, three

steamers were instanced, which had been lost, not by fault or negligence on the part of the masters and mariners, and therefore not involving their owners in pecuniary liability, *even if the ships had not been totally lost.* On the other hand, two cases of collision were cited, no more faulty, in each of which one of the ships was totally lost, and in one of the cases the surviving ship and her owners had been condemned in enormous damages; while, in the other, had it been prosecuted, a similar result would have probably been the consequence, so severely technical, in cases of collision, do the decisions appear to have been. In the cases compared in the report, the assumption is, that there was no moral, and therefore should not be any legal fault in such disasters as between the "Adriatic" and "Lyonnais," and between the "Vesta" and "Arctic." Yet the law visited such cases with the greatest pecuniary severity, while, by similar perils of the seas, though resulting in a different class of disasters, the "Franklin" and "Humboldt" were lost, also without fault, but in no greater degree faultless than the collision cases cited. And the losses of the Columbia, Franklin and Humboldt were treated as by perils of the seas, for the consequences of which "no one pretended their owners to be involved in any pecuniary liability."

It is not contended by the report that ships and their owners are not under common law liabilities in certain cases—indeed the report complains that there is too much of it, and therefore seeks a remedy. But as to the contrasted cases—the circumstances which led to the disasters being sufficiently similar, the difference, following, being only as to the character of results, the circumstances which lead to one class of results inflicting no penalty upon owners, while similar circumstances, leading to a different class of results, inflict the severest penalties—it appears to us the argument of the report is sustained, and that it does not state the law "to be precisely opposite to what it is."

The criticism proceeds: "It is perfectly well settled that, "where a vessel is wrecked by the fault or carelessness of the "master, the owner is liable to the owner of the cargo for the "amount of his loss in consequence." Admit, as a common law principle, that this may be so, we do not perceive the proposition to be applicable to the cases of the "Columbia," "Franklin" or "Humboldt," because there was neither "fault nor carelessness" charged in either. The report did not treat those losses as by fault or carelessness of masters, &c.

The criticism, however, seeks to prove its proposition,

"It is perfectly well settled," &c., by citing a case as follows: "In 1854, the steamship *City of Philadelphia* struck the "point of Cape Race in a dense fog, *and was lost, with her* "*cargo.* One of the shippers brought his suit against the "owners, and the court held that running on an island, cape "or continent, under a full head of steam, in a dense fog, "was not the occurrence of a peril of the seas, which would "exonerate the owners, but was owing to gross negligence "and carelessness, for which the owners were fully respon- "sible."

We have taken some pains to find a report of this case, viz., "Basin *vs.* Richardson and others," the leading features of which we believe to be as follows: The defendants were owners of a line of steamships sailing between the ports of Liverpool and Philadelphia. The plaintiff had goods in Havre, France, where defendants had an agent authorized to receive goods and issue bills of lading. On 28th August, 1854, the said agent gave the plaintiff a bill of lading for eighteen cases of merchandise, laden per steamer Shamrock, at Havre, bound for Liverpool to be transhipped at Liverpool on board the Liverpool and Philadelphia steamship "City of Manchester," or other steamship appointed to sail for Philadelphia on Wednesday, September 6, and failing shipment by her, then by the first steamship sailing after that date for Philadelphia, and to be delivered in the like good order and condition at Philadelphia. The bills of lading contained several exceptions which need not be stated. The "Shamrock" arrived at Liverpool in time to ship sixteen (of the eighteen) cases by the "City of Philadelphia," which sailed from Liverpool 30th August. The two remaining cases were shipped per "City of Manchester," which sailed from Liverpool 6th September. The "City of Philadelphia" was lost on a point of Cape Race, as has been stated, September 7, 1854. She struck in a dense fog, and was at the time thirty miles out of her course. A portion of the goods in question was received from the wreck, in a damaged state, and afterwards delivered to the plaintiff at Philadelphia. Two cases of them were totally lost.

The plaintiff claimed to recover,

First. That the bill of lading proved an absolute contract to ship per "City of Manchester," to leave Liverpool September 6, and that any shipment prior to 6th September was at the risk of the defendants, and in violation of the contract.

Second. That no usage prevailing at Liverpool could vary

an express contract, more especially one made at Havre, where no knowledge of such usage was shown to exist.

Third. That assuming that the defendants had the right to ship by the City of Philadelphia, they were liable, because they had failed to show that she was lost through any of the perils excepted in the bills of lading.

Fourth. As to the measure of the plaintiff's damage.

Defendants responded—

First. That receipt given for the goods at Havre was not a maritime contract, but only an engagement preliminary thereto, and therefore not within the Admiralty jurisdiction of the District Court.

Second. That defendants were not bound to detain the goods at Liverpool, to await the sailing of the "City of Manchester," but, both by law and usage, it was both their right and duty to send them forward by the "City of Philadelphia."

The defendants' third and fourth points are not important to be stated.

The case was tried in the third circuit of the United States Court, where Mr. Justice Greer delivered the opinion of the court, May 7, 1857, and held that the case presented but two questions: First, Are defendants liable? Second, If so, what is the rule of damages, and their amount how ascertained?

The question of liability is the only one we have at present to do with. In reference to this, the judge decided, that the goods should have been shipped in the "City of Manchester," 6th September, and said: "If the goods had been sent by "the Manchester, the risks excepted in the bill of lading "would have been borne by the plaintiff, for these he was "his own insurer, and the carrier for those not excepted. If "the carrier changes the vessel and the time of despatching "the goods, he has substituted different risks from those "stipulated by the parties, and should be held an insurer "against all loss from whatsoever cause. *The loss to libel-*"*lant is a result of defendants' breach of contract.*"

If the judgment of the court had rested here, the defendants would have been found to be liable, not because of the carelessness or neglect of the captain of the "City of Philadelphia," but because they were under contract, precedent, to ship the goods on board the "City of Manchester," with which the act of Congress, to limit the liability of ship-owners, has nothing to do.

The court, however, proceeds: "But assuming that the

"plaintiff had no good reason for desiring his goods to be "sent by a particular vessel, and the insertion of the name "of the Manchester was merely *pro forma*, to fill up the "usual blanks in a finished bill of lading, is there any evi- "dence whatever that the goods were injured in consequence "of any accident excepted in the bill of lading?"

Upon a review of the evidence and circumstances of the loss, the court concluded this point by saying: "The defend- "ants have not alleged or proved any one fact tending to "relieve them from responsibility. That a steamboat has "been, either ignorantly, carelessly or recklessly dashed "against a cape in a thick fog, cannot be received as a plea "to discharge the carrier. Yet for any thing that appears, "such is the case before us. If there were any circumstan- "ces tending to lead to a contrary conclusion, they are not "evidence in the case."

It will be observed, that the defendants did not plead exception under the act of Congress of 1851, and if they had so pleaded, it could not probably have availed them, because, as we are informed, they made a net salvage from the wreck and her freight, which they did not transfer or abandon for the benefit of claimants, as provided by the act. By not making a formal transfer, (as the argument of the report is, and sustained by the opinion we have quoted from Judge Kane in the case of the steamship Union,) they elected to retain their interest in the salvage, whereby, whatever their liability, it was *in personam*.

This makes a very different case from what the criticism presents. It was not a case of total loss, and the owners, not having surrendered their interests, were not exempted from the consequences of the captain's delict, even if they had not been liable for breach of a pre-existing contract.

But if the stranding of the "City of Philadelphia" presents, at common law, a delict on the part of the master and mariners, for which their ship-owners are bound, we think it enhances the argument for the release of such owners, in such cases, by proper statutory provisions.

In the opinion of Judge Greer, upon the case, after reciting, "The only account given of the loss of the 'City of Phila- "delphia,' he says: "Here then we have no other reason "given by the captain, nor any testimony whatever as to "how or why this great mistake of running against a cape "occurred. The answer and the witness *both seem* to assume "that running against a cape or continent is one of the usual "accidents and unavoidable dangers of the sea. That can-

"not be termed *an accident of the sea*, within the exceptions "of the bill of lading, which proper foresight and skill in the "commanding officer might have avoided. If the compass "on the new iron vessel was not sufficiently protected to tra- "verse correctly, the vessel was as little seaworthy as if she "had no compass; and this should have been carefully as- "certained before she started on her voyage. If there was "no fault in the compass, then it was very evident that the "officer, who is thirty or forty miles wrong in his calculation, "and driving through a thick fog with a full head of steam, "and first discovers his true position by running on an island, "a cape or a continent, has neither the skill nor the prudence "to be intrusted with such a command, and for want of such "an officer, the vessel is not seaworthy."

As the reference to this case brings to public view an imputation against the qualifications or proper conduct of Captain Leitch, master of the "City of Philadelphia," at the time of her stranding, it is due to him, to say, that "the special in- "spectors, appointed by the Lords of the Committee of Privy "Council for Trade, on the 20th December, 1854, to inquire "into the circumstances attending the loss of the steamship "City of Philadelphia, in accordance with the provisions of "the 104th section of the Mercantile Marine Act," in their report, express their "regret that they are unable to account "for the circumstances which led to this misfortune; but "they have the satisfaction of reporting to my Lords, that "they are of opinion, that every precaution had been taken "by Captain Leitch and the officers of the *City of Philadel-* "*phia*, and that they exculpate them from all censure in con- "nection with this unfortunate affair."

It is not for us, in the least degree, to attempt a criticism upon the legal opinion of the learned judge. On the contrary, we can have no doubt that opinion was given upon, and is a faithful exposition of, the common law of the case, if the ship was wrecked by the carelessness or neglect of the master and mariners. Nor do we know how far the ship's compasses were matter in evidence upon the trial as to their correctness. It would seem, however, that there may have been an allusion to them, in view of the reference made in the opinion aforesaid. It appears to us proper, therefore, not to leave the justification of Capt. Leitch merely to the conclusion (just quoted) of the "special inspectors," but to refer to some of the evidence upon which it was based, to see whether that conclusion was *morally* just. If it was, we contend that the law *should be* such as that Capt. Leitch

should be *legally* justified, and owners in such cases be relieved from all liability.

From the evidence taken by the "special inspectors" aforesaid, it appears that Capt. Robert Leitch had commanded ships for eleven years; the last six years he had served in steamers, three of which as chief officer in the British and North American Mail steamers, and the last three years and a half as commander of the "City of Glasgow," the "City of Manchester" and the "City of Philadelphia," all iron steamers. He had made in these ships about forty passages, and never met with any previous accident. After leaving Liverpool on the last voyage, every thing proceeded well up to the time of striking. Captain had an observation to find the longitude of the ship's place, Sept. 7, at 9 A. M., and an indifferent meridian altitude at noon. At 12.35 had a good observation of the sun's altitude, and reduced it to the meridian, which placed the ship four miles south of what it appeared to be by the meridian altitude. Then, feeling perfectly confident of the ship's position, the captain steered a course S. W. by W. ½ W. by the standard compass, that should have taken the ship 30 miles south of Cape Race. The position of the ship which these observations gave, was as near as possible the same as by the dead reckoning. The wind at that time was S. S. E., varying to S. E. About 8 P. M. it became very foggy, and therefore a man was stationed alongside the engine; the engineer was directed to stand by the engine, two hands on the forecastle to look out, an officer at the bridge, and an officer at the binnacle. These precautions were taken, not under the impression of making the land, but in view of meeting ice or of collision with another vessel. About 11.30 P. M., the ship struck. For several days before, the fishermen had difficulty to cast their lines, on account of a strong current to the N. E.; this was down the shore, where there is usually a S. W. current.

We observed an azimuth about 38 hours previously to striking. This gave the deviation of the standard compass about 19 degrees easterly, the variation being in that locality 34 degrees west. The azimuth compass was compared with the standard compass, which was not compensated by magnets, but the ship was swung, and the errors were tabulated previously to leaving Glasgow. By this comparison, Captain made the deviation of the standard compass the same as that given in the table. Captain's whole reliance was placed in the standard compass; it was placed about 10 or 12 feet before the mizzen mast, and about 5 feet above the deck of

the deck-house. No reliance could be placed on either of the other compasses, for each was found to vary from day to day as much as two points. They were corrected by magnets. Captain found his course correct, as made by the standard compass; the greatest deviation was 28 degrees.

The chief officer of the ship stated that the standard compass showed truly during the whole voyage, but the other compasses were of no use at all; two of these compasses were on the wheel-house; the bridge compass was about 12 feet before the funnel, on the bridge; these three were corrected by magnets, but the standard compass was not. We steered entirely by compass, and by comparing the courses steered, and observations of the ship's place. Could only account for the accident from a N. E. current, which, we found from the fishermen, had prevailed for three or four days, in such a manner as to prevent their fishing; "I afterwards observed it myself."

The second mate was officer of the watch at the time the ship struck; had no idea they should make the land; were steering at the time S. W. by W. $\frac{1}{2}$ W. by standard compass. Was on the forecastle at the time; weather thick. One of the men on the look-out cried out, "Starboard the helm, there is a lump of ice." Second mate saw it was a breaker, and called out to the engineer to reverse the engine, but ship struck immediately. The third mate was on the poop, and Capt. Leitch had only left the deck a short time, and was on deck immediately the ship struck. Second mate believed it must have been the current or the land drawing the north end of the compass. Had frequently observed errors in the compass, in and about the St. Lawrence, and with reference to wooden ships. Kept the ship's dead reckoning, and had no reason to doubt the accuracy of the ship's standard compass. The watch was on deck at the time the ship struck, all steady and well conducted.

Does not this train of evidence show the direct reverse of neglect or carelessness in navigation? It appears to us that Capt. Leitch is proved to be a skilful and watchful navigator. His observations were closely and particularly attended to, with frequent proofs as to their accuracy and of the accuracy of the dead reckoning. His confidence concerning the position of his ship at 12.35 P. M., September 7th, was undoubted, and rested upon satisfactory observations and proofs, and his course was laid in conformity. We cannot perceive any lack of "skill or prudence," nor how his conduct should

have rendered his ship unseaworthy. His watches and look-outs were numerous, and at various parts of the ship.

In regard to the compasses, it would seem that they had been submitted to all practical tests before the ship left her port; that they were placed in different positions in the ship to guard as much as possible against and to balance variations, and that the standard one was proved to be reliable upon the voyage. But if the others, or all of them, had made deceptive variations, and that because of attractions to which iron ships may make compasses liable, to condemn a ship as being "as little seaworthy" as if she "had no compass," appears to us as equivalent to condemning all iron ships as unseaworthy. Iron ships have become as common, if not as numerous, as those constructed of wood; and whatever may be the doubts in some minds about their being, in any particular, as seaworthy as wooden ships, it would be strange indeed if shippers of goods in them, or underwriters upon them, or their cargoes, could demur to their seaworthiness because they are constructed of iron, or because that material in their construction causes deceptive variations in their compasses. Iron ships may be rejected by shippers and underwriters, but it is too late to establish a claim of unseaworthiness upon any such grounds, after the risks upon them have been taken.

Let us, however, return to the hypothesis of the criticism, which, in its citation of the case of the City of Philadelphia, we understand to treat as a common law case after a total loss of ship and freight, and as such not protected by the limitation act of Congress of 1851. We have endeavored to supply what we think the criticism omitted, in the citation of the case, viz., that it was not a case of total loss; that the owners of the ship did not transfer, or abandon, what remained of the ship and freight, and therefore, could not plead the law of limitation, even if the owners had not been made liable by the breach of a pre-existing contract. But our critic should know, because *he* certainly cannot be *ignorant* of the law, that there are adjudged cases fully sustaining the principles of that law, exactly parallel to the case of the City of Philadelphia, as *he* has presented it. We will refer to two such adjudged cases, which we think will sustain what the report claims as the law, and, at the same time, not be in conflict with the case of the "City of Philadelphia," as *we* understand it, and have stated it to be. One of these cases was decided in England, the other in this country. The first, Wilson *vs.* Dickson, 2 Barnewall & Al-

derny, p. 2. "In an action *vs.* several defendants, as ship-"owners, for damage sustained by the loss of goods laden on "board their ship, it was held that, by 53 Geo. III., 159, s. 1, "they were not liable in that character beyond the value of "the ship and freight due, or to grow due, *although the loss* "*was occasioned by the misconduct of one of the defendants*, "*who was both master and part owner.*" Second, "*that the* "*value of the ship was to be calculated at the time of the loss*, "*and not at the time of the commencement of the voyage.*" Third, "that in calculating the value of the freight, due or "to grow due, money actually paid in advance was to be in-"cluded."

The other case is reported in the American Law Reporter, vol. 2, p. 157. "Thomas Wattson & Sons *vs.* James Marks and others, owners of the steamship Union, in the District Court of the United States for the Eastern District of Pennsylvania. In this case Judge Kane ruled, 2. "Under the "third section of the act of Congress of March 3, 1851, the "personal liability of the ship-owners on a contract of af-"freightment, ceases upon a total destruction of the vessel "and loss of freight, before the completion of her voyage, "though the actual damage to, or loss of goods to be carried, "as in the case of theft, has taken place prior to the time of "the destruction of the vessel."

3. "The limitation of liability of the ship-owner, by this "section, is not affected by the fact that the vessel has been "insured, and the insurance has been paid, or become pay-"able."

The action *vs.* the owners of the steamer Union, was to recover the value of a package of gold dust of the value of $6,063 47, the loss of which, the libel charged, occurred in consequence of the "negligence, fraud, unfaithfulness and "malversation of the defendants, their officers, servants and "agents, and not by reason of any of the causes or acts men-"tioned as exceptions in the bill of lading." The plaintiff alleging that the gold dust was stolen before the accident to the ship, which resulted in her total loss, and, therefore, that the measure of the defendant's liability was her value before the loss took place. The judge did not think the evidence sustained the assertion, and added, "but whether the rob-"bery preceded or followed the moment of the wreck, or "was contemporaneous with it, is, in my judgment, of no im-"portance," &c. Again, "it is impossible, however, to give "effect to the fourth section of the act of Congress, unless "we suppose that in cases of affreightment at least, the mea-

"sure of his liability is the value of the vessel and freight "at the time the suit is brought." The court then stated the provisions of the fourth section for owners, transfer and release, and added: "The terms of this section may be said to "be inapplicable to the case of a total loss, where there re- "mains nothing to transfer; but as both sections relate to the "samc liability, the fourth giving effect to that which was "declared by the third, the import of the third section be- "comes altogether clear, viz., that the owner shall not be per- "sonally liable, where he has no longer any interest in the "ship or her freight."

This opinion is conclusive upon the point of limited liability, and also fully sustains the spirit of the report in making the third and fourth sections of the law necessarily connected, in order to its practicability. And, we repeat, that while the criticism asserts the limitation of owners' liability, it also places them under a general liability in its use of the decision *vs.* the owners of the "City of Philadelphia," to show that a total loss, in the case of that ship, did not exempt the owners from the consequences of the delicts of the master, and, by parity of reasoning, that the owners of the steamers Columbia, Franklin and Humboldt (also totally lost) would be equally liable, if those losses occurred through the delicts of the masters and mariners, while we assume that the law in such cases is "clear and simple," to the entire absence of liability as against the owners. If the "Union" had not been lost, the ship, *in rem*, would have been liable for the stolen gold dust, but not her owners after the loss of their ship. If, therefore, the critic assents to the principle of limited liability, we think he must vacatc his position in reference to the case of the "City of Philadelphia."

By the report, "the laws applicable to the great highways of nations should be universal and simple." We think all will be agreed on this point. To be simple, the laws should not be liable to a different construction; and to be universal, they should be international in their operation.

We consider that the changing circumstances of navigation, to meet the expanded and expanding commerce of the world, should influence to a conformity of law, to harmonize with the change of circumstances. If, in these changes, it has become a customary practice to run ocean steamers at common speed, by dead reckoning, in thick weather, when observations cannot be had, and this practicc is known to shippers and underwriters, they should be considered as taking that risk, and assuming the consequences of the discretionary acts

of ship-masters in relation to it. For illustration, we refer to the report of "the Special Inspectors," to which we have already alluded, in the case of the "City of Philadelphia." They invited attention to the fact, that "the danger of "striking Cape Race is rendered imminent from several "considerations, it being on the nearest approximation to "the *Great Circle Track* towards the ports of the United "States, and the currents appear to be variable, and not de- "termined by any regular laws. Between the two dangers, "the Cape Race Rock and the Virgin Rocks, there is but "little more than sixty nautical miles, and the inducements "which favorable currents and shorter distance hold out, "*at a period when all ships are engaged in the race for short* "*voyages out*, leads to the practice of hugging Cape Race "too closely, and this danger is especially aggravated by the "fogs which prevail in that region, and when the compass is "not worthy of a very great amount of reliance. It is also "raised as an argument against going considerably to the "southward of the Virgin Rocks, that a danger of another "character would be incurred—that such a track would lead "through the fishing grounds on the banks, and that frequent "collisions would be the result." In a previous reference to this report, we have already shown that "the Special In- "spectors" entirely exculpated the captain and officers of the "City of Philadelphia" from all blame in relation to her loss, and, from their report, it seems to us their conclusion was correct.

But if the master of the "City of Philadelphia" rendered her owners liable by the rate of her speed while running in a fog, we are of opinion that the owners of all ocean steamers are constantly in great danger from the same cause. We have no idea that Captain Leitch pursued, on that occasion, any other than the usual practice, which, we understand, is, to run these steamers by dead reckoning, when observations cannot be had, until that brings them near the land, and to pursue nearly the same rate of speed in clear as in foggy weather, and by night and by day. It is the fashion of the times to make short passages; passengers prefer the fleetest ships, although their speed may frequently increase risk. Underwriters charge no greater (perhaps less) premiums by steamers than by sailing ships, because they consider the shorter passages an offset for the additional risk while at sea. It is in view of expedition to both passengers and freight, that steamers receive the larger patronage and much higher rates. Both, passengers and shippers, well understand the

greater risk the increased rate of speed is subject to, and withal prefer steamers. The evidence of this may be seen in the immense increase of travel since steamers have traversed the ocean. It is the constant effort of scientific minds, more and more to shorten distance by increase of speed; nor is this the fault of ship-owners, nor will it be, while the progressive enterprise of the world gives the largest patronage to the fleetest ship. If this be a fault, it is mutual between the ship-owner, shipper and underwriter, and the consequences belong to each party participant. Those who suffer most by it, in a pecuniary sense, are the owners of sail vessels, whose trade has become permanently impaired (we may say almost ruined) by steam navigation.

Thus have commerce and navigation changed, and the laws applicable to the times of the "Santa Maria," "Pinta" and "Nina," in 1492, or to the "May-Flower," in 1620, or of the French Ordinance, in 1681, need to be changed to conform to the circumstances of the age we live in. In the early times we have alluded to, navigation was comparatively in its infancy. The then sea voyage of months, is now accomplished perhaps in a week. In the trade of the United States with Great Britain and the Continent, lines of steamers depart from each side of the Atlantic at least twice in a week; and the day is not far off when such departures will be of daily occurrence.

For the government of shippers and insurers, marine inspectors, in all important sea-ports, examine and keep a record of the qualities and character of all seagoing vessels. Let there be, also, a properly constituted board of examiners at all such ports, to investigate the character and qualifications of all candidates for the office of ship-master, and, as a precedent to his employment, let it be a legal requirement that he shall hold a duly avouched license. Then all parties concerned, whether ship-owners, shippers or underwriters, can know the vessel they ship in, and the master to whose care their property is intrusted, and be governed accordingly, without recourse to the ship or her owners for the mistakes or misfortunes of the voyage.

Very recently the steamer Austria was burned at sea, and the loss of nearly five hundred lives was the consequence. It was, doubtless, needful to health to fumigate the apartments in which so many passengers were lodged for the voyage. In doing this the fire occurred which caused the fatal and mournful result. This occurrence has been charged to gross carelessness. It may have been so; but may it not have

been, upon mature reflection, clearly accidental? There was neither intention of wrong, nor supposed danger, in the manner of fumigating; indeed, the same course may have been pursued before, with entire safety and success. Sometimes the most disastrous consequences flow from the smallest causes, or from an unaccountable providence. But this class of accidents places the ship-owner under no pecuniary liability, because the statute (where it can be pleaded) exempts him; nor should he be liable, because it was an occurrence over which he could have no control. But what, in every moral sense, was there about the case of the "City of Philadelphia," which should render her owners liable, more than the owners of the "Austria?" We think that there can be but one and the same answer to both cases, viz., that the ship-owner should not be liable in either, because he could have no control in the premises.

While the investigation of this subject convinces us, as we believe it should convince every man interested in commerce, whether shipper, ship-owner or underwriter, that the laws need modification, and to be internationally co-operative to conform to the extended navigation of the present day, and to the known practices and usages by which it is conducted, it the more fully convinces us that ship-owners, under any circumstances, should not be liable for damage to property not laden on board their own ship. The master and mariners of a ship are employed by her owners for the navigation of the particular ship and the care of her cargo, and this is their special agency and duty. If by the delicts of the master and mariners the property of others (outside of their agency, beyond the objects of their engagement, and over which the owner of their ship could have no control,) becomes injured, the sufferers may have the wrong-doers personally responsible, but no liability should reflect upon parties who are entirely innocent in the premises. A ship-master should be competent to command in all the management of his ship; his knowledge of seamanship and of navigation should be undoubted. Having these qualifications, his ship, so far, is seaworthy, and the underwriter upon her and her cargo assumes the risks of "seas, men of war, fires, enemies, pirates, rovers, "thieves, jettisons, letters of mart and countermart, surpri- "sals, takings at sea, arrests, restraints and detainments of "all kings, princes or people of what nation, condition or "quality soever—*barratry of the master and mariners, and* "*all other perils, losses and misfortunes that shall come to* "*the hurt, detriment or damage of the said vessel, or any part*

"*thereof.*" Under these circumstances two vessels come in collision, each vessel has a master with needful qualifications, and both ships, and their cargoes, are insured to cover the damage which may be the consequence. The insurer acknowledges his liability (having received a premium therefor) to his insured, although the damage may have occurred by the mistake, or even by the delict of the master of the other ship. Is it reasonable that such other ship shall be adjudged technically unseaworthy for that particular moment and circumstance, and her owners be held responsible for the damage done, without their privity—for an act they could have no power to prevent? Why, if the same master and mariners should run away with the ship, the underwriter would be bound, under his policy as above, to indemnify the owner—how, then, should the owner be made liable in case of collision, for the risk of which the insurer receives a premium? This, then, is an insurable risk, and one of the hazards of navigation, and the loss by it should rest where it may fall.

Collisions seldom, if ever, occur by design; they are, as we have already intimated, the result of *accident*, *misfortune*, or, at most, *mis-judgment*. Certain rules are laid down to be observed when vessels approach each other, if danger of fouling be apparent. If the observance of these rules could in all cases prevent collision, the obligation to observe them could not be too rigidly enforced. But the danger might not be seen until too late to avoid damage—or when seen the relative position of vessels might be such as, by observing the rules, the disaster would be increased; and sometimes lights are deceptive, so that the distance and course of one ship may be mistaken by those on board another. The case of the "Andrew Foster" and "Tuscarora," to which we have referred at some length to show how severely it resulted for the owners of the "Tuscarora," we allude to again, to show that the masters of both these ships were watchful of their duty. That while we have not seen, in the examination of the case, an intimation that either was not competent and skilful in his profession, there appears to us abundant reason to believe that both exerted their best skill to avert the impending danger, as we think will be shown by the following:

PROOFS.

On behalf of the Andrew Foster.	On behalf of the Tuscarora.
Time of Collision. About midnight, on Tuesday, April 28, (civil time.)	About 11.45 P. M., April 28, 1857.
Place of Collision. About 38 miles to the N. E. by E. ½ E. of Tuskar.	In the Irish Channel, between Bardsey and Tuskar, rather on the western side of the channel.
Wind. S. E. by E.	S. S. E.
Weather. Very dark, with rain. Squally.	Very dark and cloudy.
The course of the respective vessels on first sighting each other. The Andrew Foster was heading N. E. by E., close hauled on the starboard tack. The Tuscarora was steering the channel course, S. W. by W. ½ W., running free.	The Tuscarora was heading S. W. ½ W. When the light of the Andrew Foster was first seen, her course could not be made out; but when the Andrew Foster herself was first seen, her course was about N. W.
Distance at which the other vessel was first seen. Light seen about a mile distant, and made out to be from a vessel steering down channel.	When the Andrew Foster's light was first seen, it was distant about one mile. When the vessel herself was first seen, she was about 100 yards from the Tuscarora.
Steps taken to avoid the collision. Being close hauled on the starboard tack, the Andrew Foster kept her luff until shortly before the collision, when the helm was put down, (to port,) if possible to allow the Tuscarora to pass ahead, or, at all events, to ease the blow.	The helm of the Tuscarora was ported immediately upon the light of the Andrew Foster being seen and reported, and the spanker halyards were let go.
Parts of each vessel which first came into collision. The Tuscarora struck the Andrew Foster on the starboard bow with her stem.	Port bow of Tuscarora about ten feet forward of the fore-rigging. Starboard bow of Andrew Foster.

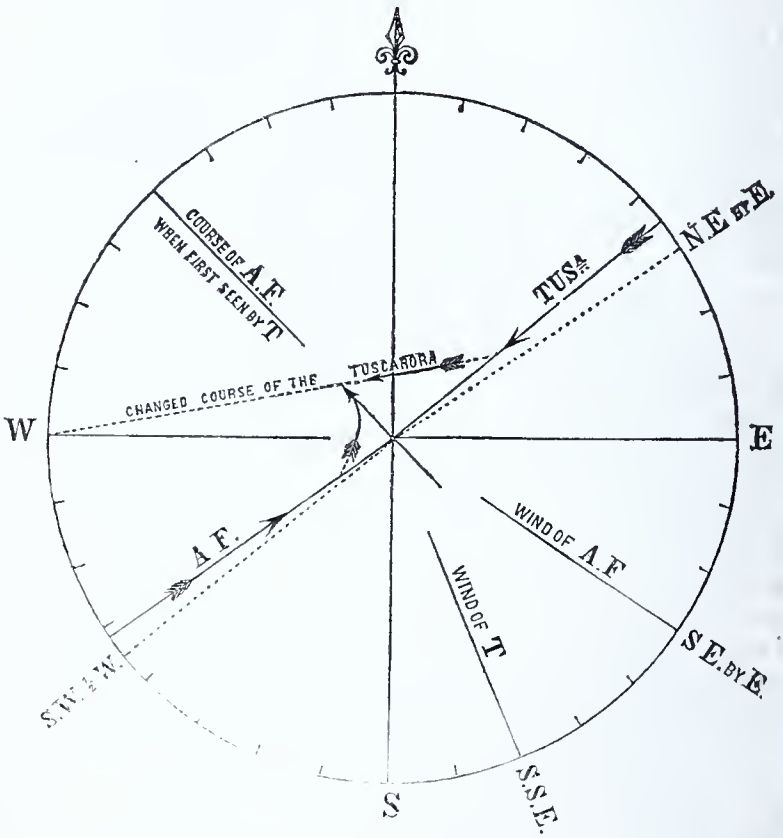
In the evidence produced on the part of the "Andrew Foster," it is said: "The light ahead appeared to be half a mile "to a mile distant, but the night was so dark that we could "not judge well of distance. The stranger proved to be a "ship standing down channel. Being close hauled on the wind

"on the starboard tack, *heading northeast by east, with the* "*wind southeast by east*, we kept along by the wind. The "other vessel soon after kept away to cross our bow, which "brought her into collision with us, and it is our belief, if "instead of keeping away at the time she did, she had kept "her course, she would have gone clear of us to windward."

On the part of the "Tuscarora," it was in evidence that "*she had the wind south southeast*, the ship was close hauled "on the port tack, *heading about southwest half west*, when the "second officer called out to the captain, who was in the "cuddy, that there was a light ahead. The captain imme- "diately ordered the helm hard aport, and went on deck "and saw the second officer assisting to put it over. The "captain saw the light of the other vessel; it was as nearly "as possible right ahead. He then ordered the spanker- "halyards to be let go, which was done as quickly as possi- "ble. The Tuscarora fell off rapidly, and the captain "watched the other vessel's light, until, from being ahead, "it came to about two points forward of the beam of the Tusca- "rora's port side. The Tuscarora's helm was kept hard aport "until she had gone off at least four points, when the captain "saw the Andrew Foster, which vessel he thought had passed "clear, far astern of the Tuscarora, coming down on the Tus- "carora's port side, before the wind, and slewing round to "her starboard helm. Almost immediately the Andrew "Foster came in collision with the Tuscarora, the fore part "of the Andrew Foster's fore-channels, on the starboard side, "coming against the Tuscarora's port bow, about ten feet "forward of the fore-rigging." On the part of the Andrew Foster, the evidence was, that the "Tuscarora struck the "Andrew Foster stem on into her, striking her with great "violence, a nearly perpendicular blow on her starboard bow, "about the cat-head," &c. Also, when the light was first seen by the master and others, on the quarter-deck of the Andrew Foster, "it was between the starboard fore and "main rigging, about two points on the ship's starboard "bow," and made out to be the light of a vessel steering down channel. When the light (of the Andrew Foster) was first seen on board the Tuscarora, the course of the Andrew Foster could not be made out, and when the Andrew Foster herself was first seen, she was about one hundred yards from the Tuscarora.

The following diagram presents, as nearly as we can define it, the relative positions of the ships, as by the evidence

on behalf of each for herself, when the bowsprit light of each was seen by the other:



The Andrew Foster had the wind from S. E. by E., was close hauled on her starboard tack, heading N. E. by E. The Tuscarora had the wind from S. S. E., was closed hauled on her port tack, and heading S. W. ½ W., and saw the light (which proved to be that of the Andrew Foster) directly ahead.

These ships were very nearly on the same line, and we do not perceive that either had any advantage of the other in the course of the wind, *as each represented her course and the wind for herself.* Both must have been about as close hauled as square-rigged vessels can lay to the wind. The Andrew Foster continued her course until shortly before the collision, and when it was inevitable. She was upon her starboard tack, consequently, if either should keep her course, she was, according to the rule in this particular. The Tuscarora was upon her port tack, and as she saw the light of the Andrew

Foster in nearly a direct range, and could go no nearer to the wind, her helm was put aport, and the Tuscarora was kept away. We do not perceive how Captain Dunlevy, (of the Tuscarora,) seeing the light, but not the course of the Andrew Foster, could have done otherwise. And we think Captain Dunlevy justified in the rule, as laid down by Mr. Justice Nelson, in the case of St. John *vs.* Paine, 10 *How.* 557, 581.

But if Capt. Dunlevy erred in his judgment, he certainly manifested every attention to his duty, every moment himself on the watch, particular in his orders and saw them obeyed, with the effect to place his ship in the position he sought for her, and in the confident expectation thereby to avoid the misfortune which occurred. This, therefore, is precisely one of these cases for which, we contend, ship-owners should not be liable.

We can have no hesitation in saying, that the underwriters upon the Andrew Foster should not have visited a double calamity upon the owners of the Tuscarora.

If Capt. Dunlevy, instead of having honestly, and with faithful endeavor, performed his duty, he had wilfully destroyed the Andrew Foster, the Tuscarora and her owners would, probably, have escaped liability. In the case of the Druid, (1 W. Rob. 391, 6 Jurist, 144,) a Danish vessel was passing out of the port of Liverpool, when she was wilfully injured by the master of a steam tug, who towed her about in a violent manner, and carried her out of her course, in consequence of which she received considerable damage. It was held by Dr. Lushington that tho owners of the steam tug were not liable. "The general principle of law, that the "master is liable for the acts done by his servants in the "scope of their employment, is not denied; but it is con- "tended, on behalf of the owners of the Druid, that the prin- "ciple does not apply to this case, and that no such liability "exists where the servant, though occupied in the affairs of "his master generally, has occasioned an injury by his vio- "lent, wilful and malicious conduct."

In support of our argument for the exemption we contend for on behalf of the Tuscarora and her owners, we refer to the following case, viz.:

On the 14th August last, near midnight, a collision occurred off Cape Race, between the Cunard steamers "Europa," bound from Boston to Liverpool, and the "Arabia," bound from Liverpool to New-York. After the arrival of the Arabia, forty-five of her passengers published an account of

this case, in which they say: "From the statement of eye-
"witnesses, it appears that when the light of the Europa was
"first discovered, the relative positions of the vessels, and the
"speed at which they were going, rendered a collision at
"some point inevitable. The alarm-bell was instantly rung,
"and Mr. Anderson, the officer of the watch at the time,
"gave the order to put the helm a-starboard. The general
"rule in the case of vessels meeting each other from opposite
"directions in the ocean, is, that each shall put the helm a-
"port. In this case, the officer, Mr. Anderson, saw that by
"following the rule, the Arabia would be driven directly
"upon the course of the Europa, and must strike her at right
"angles. Such a collision would have sunk one ship, and
"perhaps both. The responsibility of deciding what to do
"was of the gravest character, and had to be taken instantly,
"under circumstances that might well appal the stoutest
"heart. Mr. Anderson showed himself equal to the emer-
"gency, and, without a moment's hesitation, took the respon-
"sibility of his order, which was instantly executed. This
"altered the course of the Arabia about two points before
"the ships came together, and the collision took place in a
"slanting direction, at the bows. Both ships were somewhat
"damaged, but neither of them fatally. The damage done
"to the Europa, causing her to leak, made it necessary to
"put into St. Johns for repairs. Some injury was done to
"the bows of the Arabia, and the pillow-block of the star-
"board paddle-wheel was so much injured that it became
"useless. This appears to be the utmost extent of the dam-
"age, in a collision between two powerful steamships, of
"nearly equal force, *under a heavy fog and at full speed.*
"So extraordinary a result we believe to be due, under
"Providence, to the admirable seamanship of Capt. Stone,
"his officers and the engineer, to the excellent discipline of
"the men, and to the promptness and courage with which
"the officer of the watch made up his judgment and gave his
"order in accordance with it. We, therefore, feel it our duty
"to express to them our entire confidence in their capacity,
"skill and firmness, and our belief that to those qualities,
"exercised in a most dangerous emergency, we are indebted
"under God for our safety."

This is another proof that steamers do not abate their speed in foggy weather, nor at night, and the passengers who made this statement utter no complaint nor dissatisfaction at this known custom. It is a custom all travellers by sea know

before they embark; they know it by the usual length of the voyage, and take the hazards of it.

This case also proves that there cannot, with security, be arbitrary or fixed rules for the government of ship-men in such cases without, at times, an increase of risk; and, therefore, for the safety of life and property, the discretion must be left with those whose duty it is to act at the moment of emergency, without placing ship-owners under liability for what the consequences may be, although the result of such action might prove to have been a misdirected judgment. Suppose Mr. Anderson's first impulse should have been to act by the rule in such cases, (and such might have been his act had he supposed a different course would have involved his owners in a large pecuniary loss,) and, in conformity with the rule, had ordered "helm a-port," the probability is, the case would have been fatal to one or both the ships; and yet, the observance of the rule should have acquitted the Arabia and her owners of liability, if not the ship-men of blame. We look upon the escape of these two ships, as by the interposition of Providence, directing the course of events, more than by the conduct of Mr. Anderson, unaided by a superhuman agency, and, therefore, whatever might have been the result, the loss should have been borne by all directly interested, without recourse to any others.

The case of the "Andrew Foster" and "Tuscarora," in no way that we can perceive, presents a less close attention to duty on the part of Captain Dunlevy, of the Tuscarora, than on the part of Mr. Anderson, of the Arabia; and yet, with all the diligence and best judgment combined, of Captain Dunlevy, his owners have been held to be liable to the whole value of the Andrew Foster and her cargo. In this there is no safety for ship-owners; on the contrary, they are constantly in danger of bankruptcy and ruin. So far, therefore, as the laws maintain such liability, they are defective in both equity and morals—and if so, they should be effectively modified.

The criticism also says: "It seems, also, that the committee undertake to justify Capt. Dunham in his abstraction of the Adriatic from the custody of the French courts, and point out the *monstrous injustice* of the decision of the French tribunal. As this part of the report is not given, we cannot judge of its merits, but the gross ignorance which the writer has shown on matters of common law does not entitle his judgment to much confidence in this respect." In this invective of a part of the report which the critic ad-

mits he had not seen, he has drawn upon his fancy rather than fact. The report does not undertake to justify Capt. Dunham in his abstraction, &c.; on the contrary, its language is, "Capt. Dunham, driven to extremities, has certainly placed "himself in a position of the greatest possible difficulty, should "circumstances again find him in France." Nor does the report point out the "monstrous injustice" (which the critic has placed in quotation points as from the report) of the decision of the French tribunal. The report does say: "The "statement recently made by Capt. Dunham, touching the "collision of the Adriatic with the Lyonnais, has such strong "and clearly marked points about it, both in reference to his "close watchfulness of duty and propriety of conduct on that "occasion, and the apparent disregard on the part of the "appellant court in France, for any thing but indemnity to "the owners of the Lyonnais, that we cannot but refer to its "prominent incidents." In this the report takes for its basis the statement of Capt. Dunham himself, as made to Congress, and treats that statement as truth upon his responsibility. If that statement be true, (and we know of no reason to doubt the veracity of Capt. D., or to believe he would make a statement to the Congress of the United States which the recorded testimony of the case in the French courts could impeach,) we think the report does not indulge in too strong terms in reference to the judgment of the Imperial Court of Aix. Nor can a case be cited, to show more emphatically that the law of duplicate liability should be abolished.

The writer of the report, and of this addition to it, has no pretensions to being a lawyer; but although he may be judged to be "grossly ignorant on matters of common law," he does (he trusts) entertain sentiments of common justice, as it relates to every day experience in commerce. He has, however, been judged by a legal gentleman, no doubt, whose law may be good, *or it may be bad.* In this review, we have, so far as legal decisions are concerned, given the reported opinions of jurists of eminence, which we hope may be thought worthy the respect of our critic, even though, in some particulars, they may not rise to the full measure of his self-esteem and ready pen.

In what has been written, we have had no motive of controversy, but, as plainly as we could, to illustrate the general subject in its practical operations. We have, in this review, confined ourselves chiefly to recent cases, that the history of such may show their applicability (as a natural consequence) to the extended commerce of the present day. The increased

danger of collision, for instance, when a thousand vessels navigate the same ocean, compared to when it was navigated by fifty. As men engaged in commerce and interested in ships, freights and cargoes, and as underwriters, (each particular interest being insurable to cover the risks we have discussed,) our experience teaches us that the laws of personal and property liability—both common and statute laws—so far as that liability attaches to ship-owners, need important modifications, in order that they may bear equitably upon all classes concerned, and also that such modifications should be made international. Without international co-operation in the laws which relate to the highways of nations, local statutes would be a very partial remedy.

It is not uncommon for a single ship to bring from the marts of Europe to those of the United States, cargo, greatly exceeding a million of dollars in value, to perhaps hundreds of consignees; and the treasure cargoes from the Pacific to the Atlantic are of no less value. All these are insurable, and, we think, are chiefly insured, and underwriters receive the premium upon them to cover the risks we have enumerated. The masters who navigate these ships are generally as well known to the insurers as are the ships themselves, and all the casualties to which they are subject in their voyages. Although, therefore, the suggestion to relieve ship-owners from liability may be new, it is entirely just that they should be released, in the very nature of the case, to accord with the commercial circumstances of the age. It is with this view the subject has been introduced, and to make it familiar to those whose every day duties do not lead them to the consideration of it, we have referred, at much length, to several prominent cases, which we think will carry conviction of the fact, that modifications are needed and should be made.

New-York, December, 1858.